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71-1678

No.

Supreme Court, U. S.
FILED
JUN 24 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

NICK PRIGNANO,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST DISTRICT

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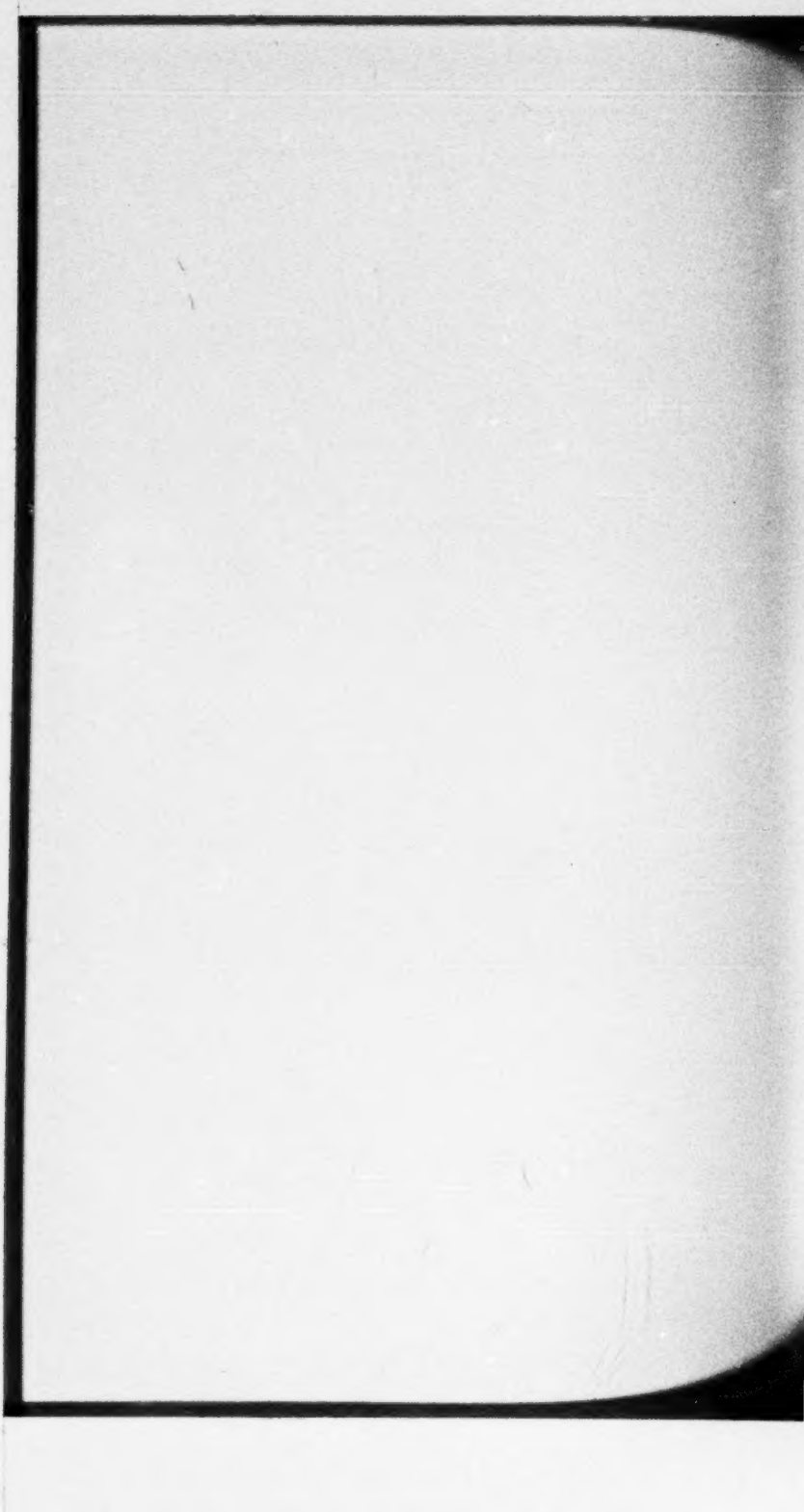

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Nick Prignano, respectfully prays that a Writ of Certiorari be issued to review the decision of the Appellate Court of Illinois, First District, hereto appended.

REFERENCE TO LAW REPORTS

The opinion of the Appellate Court of Illinois is reported at 2 Ill. App. 3rd 1063 and at 278 N.E.2d 128.

The judgment of the trial court was rendered without opinion, and is not reported.

The order of the Supreme Court of Illinois denying further state review, also was entered without opinion and is not reported.

JURISDICTIONAL GROUNDS

Date of judgment sought to be reviewed: The opinion of the Illinois Appellate Court was filed first on November 18, 1971. On March 30, 1972 state rehearing procedure was exhausted and denied. State mandate has been stayed pending this Petition.

Rehearing and extensions: No extension has been granted petitioner for the initiation of any proceeding. All filings have been timely.

On December 2, 1971 petition for rehearing was filed in the Appellate Court of Illinois. That petition was denied on December 30, 1971. Petition for leave to appeal to the Supreme Court of Illinois was timely filed on January 31, 1972 pursuant to Illinois Supreme Court Rule 315 (S.H.A., Ch. 110-A, Sec. 315). That petition was denied on March 30, 1972.

No rehearing was sought in the Supreme Court of Illinois. By subsequent order, mandate was stayed pending the presentation of this Petition.

This Petition is presented within 90 days of the denial of leave to appeal by the Illinois Supreme Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Where no circumstance tends to excuse the use of "lineup" procedure for identification, and where a witness to a crime states that he observed the offender for only one to two seconds in a stress situation, is a suggestive single confrontation between the witness and a captured suspect permitted by the decision in *Kirby* v. *Illinois* (70-5061, decided June 1, 1972); or does the Due Process requirement expressed in *Stovall* v. *Denno*, 388 U.S. 293, require the use of a lineup in such a situation?

2. Where the witness described in Question 1 above provides a description of the offender prior to confrontation; and where that description is written down by the investigators but is then lost under unexplained circumstances; is the in-court identification and testimony concerning the extrajudicial identification barred on the "spoliation" theory?

3. Is denial of counsel at pre-indictment confrontation, as authorized by *Kirby* v. *Illinois*, nevertheless a factor to be considered in determining whether the confrontation was offensive to due process under the doctrine of *Stovall* v. *Denno*?

4. Granted, under *Kirby* v. *Illinois*, a suggestive confrontation is not unlawful *per se*. In that light,

(a) At what point does a confrontation become so suggestive as to constitute the denial of due process envisioned by *Stovall* v. *Denno*?

(b) In setting the tolerable limit of suggestiveness, should the witness' opportunity to have observed the offender at the time of the offense be determinative?

(c) Should the prosecution be required to offer any justification for a suggestive confrontation?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, so far as relevant:

> "No state shall . . . deprive any person of life, liberty or property, without due process of law . . ."

STATEMENT OF THE CASE

Petitioner was indicted in this case together with one Anthony Sipich. Both defendants moved to suppress identification evidence proceeding from certain witnesses. The motion was sustained as to defendant Sipich and the case was thereupon dismissed as to him before trial (A.* 21). Accordingly, Sipich was not involved in the appellate proceedings.

Petitioner Prignano's suppression motion was denied, and the case proceeded to trial before a jury. The suppression motions were renewed and denied at the time of trial. Judgment of conviction was entered on a jury verdict of guilty. The Illinois Appellate Court affirmed, and leave to appeal was denied by the Illinois Supreme Court.

The central issue relates to the circumstances of the identification of defendant by state witness Van Note. We also present the facts relating to "the continuity of the chase", in view of the Appellate Court's observation that this evidence was highly relevant and because we feel that it demonstrates a total lack of necessity for a single confrontation with Van Note.

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* Designation "A" refers to defendant's abstract in the Illinois Appellate Court. No additional abstract was filed by the State. Fifteen copies of that abstract have been filed with this Court. The designation "Tr." refers to the stenographic report of proceedings at the trial.

Van Note's Observations at the Scene

A LaSalle Hotel security guard, Joseph Gnutek, interrupted two burglars in the hotel security vault. He was overpowered, and the man fled. He did not see the face of either man, and was unable to describe them other than to say that one was taller and the other shorter than himself. As they fled, Gnutek called for help (A. 4, 5). Jon Van Note, the hotel's night manager, was behind the front desk. Because of the glass partitions, it was necessary that he climb on a stool to look out (A. 11, 12). He saw a tall man and a short man running. The tall man had passed by him at the time, so that Van Note was unable to see his face (A. 6). The short man was so close behind the tall man, that the two of them entered the same section of the revolving door opening on LaSalle Street (A. 24).

Van Note testified that he was able to see the small man for "one or two seconds" (A. 6).

At that time, the small man was running, and was turned away from Van Note (A. 8). Van Note was concurrently watching the taller man. Because the short man was wearing a raincoat, Van Note was unable to determine his build (A. 25). He had never seen the man before (A. 8). The distances involved were from 30 to 100 feet.

Both men wore raincoats and "regular brim hats" (A. 8). Except that his sideburns were dark, Van Note was unable to tell anything about the small man's hair because of the hat. He was unable to tell much about his size because "when you run squat you reduce your size actually" (A. 12). He believed the man was between 28 and 50 years of age (A. 12).

The men ran down LaSalle Street and got into their car parked on the West side of LaSalle Street a block

south of the hotel. The car pulled away. Because of the distance and night conditions, he was unable to describe their car (A. 12).

Subsequently, investigating police arrived. Van Note spoke with them and gave them a detailed description of the man he had seen. As he spoke, the officers wrote down his description (A. 10, Tr.* 42). When defense counsel demanded production of that memorandum, he was informed by the prosecutor that no such memorandum existed (A. 10, 11). The officers to whom the description had been given, were never identified.

At the trial, Van Note was asked whether it was a fact that he had told the police that he was not sure whether he would be able "to make an identification of the person arrested". Van Note professed an inability to remember whether he had said that at the time. He explained that he was unable to recall everything that had been said because "there was a lot of people talking in the room at that time" (A. 25).

Van Note was able to see the face of the smaller man for not more than two seconds, and perhaps as little as one second (A. 6). The small man "moved pretty fast" (A. 23).

The "Continuity of the Chase"

As Van Note followed the men out the door he lost sight of them briefly (A. 22). Policemen Jacobs and McCurry, patroling the Loop in a squad car were driving south on Clark Street. Approaching Madison, Jacobs looked west and saw two men running a block away on LaSalle Street

* "Tr." refers to the transcript of proceedings at the trial.

(A. 15). They were *not* moving in a straight line; instead, they were "angling" from a drug store on the west side of Madison Street toward the *east* (A. 26). (There is a drug store in the hotel, served by a different entrance from that through which Van Note saw the men depart; but the hotel is on the west side of the street).

One man was tall, and the other short. The tall man was *not* wearing a hat (A. 26-27) and was wearing a grey three-quarter length car coat, a black sweater, and a white shirt (A. 15). The two men entered an automobile parked south of Arcade Place (one-half block south of Madison Street) on the west side of LaSalle Street, facing south. The man who got in on the driver's side was short, about 5'2", wearing a dark coat, a black hat and dark-rimmed glasses. "We attempted to question them but they got in the car and they just took off" (A. 15).

The car proceeded south on LaSalle Street to Adams, west on Adams to Wells and south on Wells to Congress, with the Jacobs-McCurry squad car pursuing. McCurry noted the license number (A. 28). Jacobs radioed that they were "chasing a car" (A. 15). The chase went on to the Dan Ryan Expressway and then to 18th Street. As the vehicle proceeded east on 18th Street, Jacobs and McCurry lost sight of it (A. 16). At that time, the car might have been at 23rd and Canal (A. 28). A few minutes later, in consequence of radio coordination, other officers observed a vehicle of similar description go through a stop sign on 31st Street. The vehicle pulled to the curb and stopped. Petitioner was the sole occupant of the vehicle (A. 13, 14).

Jacobs and McCurry arrived later. McCurry pointed at Petitioner and said, "That's him" (A. 28). Jacobs said "That's the man we are looking for. Hold on to him"

(A. 16). The defendant was handcuffed, and taken back to the LaSalle Hotel (A. 28) "for identification" (A. 18).

The Confrontation at the LaSalle Hotel

Petitioner, still handcuffed, was driven by the police to the LaSalle Hotel (A. 28) "for identification" (A. 18). Fairly directly on the way from the scene of the arrest to the hotel, was the main police building at which the lineup in this case was subsequently held; but no stop was made there at the time.

Meanwhile detectives were conducting an investigation at the hotel (A. 10). They interviewed Van Note. He furnished to them a description of the man that he had seen, and the description was written down by the police (A. 10, Tr. 42). However, the written memorandum could not be located by the state in response to the defense request for its production (A. 10, 11).

Petitioner was then brought into the hotel in the custody of two uniformed policemen (A. 6, 7), his hands cuffed behind his back (A. 15, 28). Van Note observed that the policemen "were bringing him in" (A. 9). When he saw them walking in, he "had a pretty good idea that it had something to do with the burglary" (A. 11).

Van Note, seeing the defendant thus brought to the hotel, identified him as one of the men he had earlier chased (A. 6, 7).

Defendant was kept at the hotel and questioned for approximately half an hour. He was then taken to the police building at 11th and State Streets in Chicago. Van Note saw him leaving (A. 7, 24).

The Line-up

Several hours later, in response to a police request, Van Note came to the police building. He was there asked to view a line-up of five men (A. 7).

Viewing the line-up with him were:

(a) The hotel security guard, Gnutek, who had previously stated that he had not seen his assailants (A. 5);

(b) Officer McCurry, who had arrested the defendant earlier that evening and spent considerable time with him (A. 19, 20). Gnutek was driven to the line-up by the police, who told him "that they have the fellows there, if he could identify them" (A. 5).

The defendant is variously described in the record as being 5′ 2″ (A. 15, 17) and 5′ 6″ (A. 13) in height. Of the other four men in the line-up, one was 6 feet tall and the other three were 5′ 10″ tall. Thus the defendant, who had been referred to throughout the investigation as the "short man" or the "shorter of the two men", was by some four to eight inches the shortest man in the line-up.

The detective who had arranged the line-up, was aware that a previous identification had been made at the hotel (A. 19).

At the line-up, Van Note (A. 19) and officer McCurry (A. 20) duly identified the defendant. Mr. Gnutek remained unable to make any identification (A. 19).

• • •

Defendant Prignano moved to suppress the identifications before trial (A. 2). On hearing, that motion was denied (A. 3). The motion was renewed and denied twice at trial (A. 22, 29). Defendant was convicted on the verdict of a jury.

STAGE AT WHICH THE FEDERAL ISSUE WAS RAISED

The federal Due Process issue was raised at every stage of the proceedings below. Each time, the ruling was adverse to Petitioner.

Prior to trial, Petitioner moved to suppress the identification by Van Note, stating, inter alia, that the confrontation had been so suggestive as to amount to a denial of due process of law, contrary to the relevant federal and state constitutional provisions (A. 2, R. 20). The motion was denied by the trial court (A. 3, R. 25). The motion was renewed, and again overruled when the identification testimony was offered at the trial (A. 22, Tr. 95-96); and it was renewed and denied again at the close of all the evidence (A. 29, Tr. 298). It formed the principal basis for Petitioner's motion for a new trial (A. 30, Tr. 374). In the Appellate Court, Petitioner's principal assignment of error related to the denial of those motions. He specifically claimed denial of rights granted by *United States* v. *Wade*, 388 U.S. 218; *Gilbert* v. *California*, 388 U.S. 263; and *Stovall* v. *Denno*, 388 U.S. 293. The Appellate Court considered the Due Process question in the light of this Court's decisions (App. 1, p. 3), but held that the single confrontation was justified by the exigencies of the situation. On petition for leave to appeal to the Illinois Supreme Court, petitioner contended that the Illinois interpretation of the right to due process at confrontation, was contrary to the decisions of this Court. (Petition, p. 11). That petition was denied without opinion.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

This case presents the issue not reached in *Kirby* v. *Illinois*, 70-5061, decided June 7, 1972.

In *Kirby*, your Honors ruled that the right to counsel at confrontation applies only after the preferment of formal charges.

Kirby also holds that suggestiveness, standing alone, will not cause the suppression of an identification produced by a confrontation. In *Kirby*, the victim was brought to a room in a police station where the two suspects were seated at a table.

However, the victim in *Kirby* claimed that he had had "a good look" at the offenders at the time of the crime (footnote 2, plurality opinion), thus establishing a very adequate basis for the identification independent of the confrontation. Thus, the only issue clearly presented by *Kirby*, related to the denial of counsel. The concurrences of the Chief Justice and of Mr. Justice POWELL, clearly demonstrate that only the *per se* exclusionary rule relating to absence of counsel was resolved by that case.

The plurality opinion states that the Due Process Clause "forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification."

Reasonably construed, therefore, *Kirby* would seem to indicate that counsel need not be provided at a confrontation prior to preferment of charges; that a suggestive confrontation will not necessarily result in exclusion; but that if the confrontation is unnecessarily suggestive, and

likely to provoke a mistaken identification, it will constitute a denial of Due Process.

The likelihood that a suggestive confrontation will produce a mistaken identification is, we suggest, obviously dependent upon the opportunity of the witness to have observed the offender at the time of the crime.

In this case, the witness claims to have seen the offender for not more than two seconds, and perhaps as little as one second (A. 6). That observation was made concurrently with the witness' view of another man, considerably taller. The men were running, and turning away from the witness (A. 8). They were wearing raincoats and hats (A. 8). The circumstances were extremely frenetic, and the witness had to climb on a stool to observe the event over an intervening partition (A. 11, 12).

It is quite inconceivable that any witness will ever make a courtroom identification based on any lesser observation. For on any lesser observation, the observer quite literally would not be a witness. It is understatement to say that a view of "one or two seconds" provides only the most tenuous basis for the subsequent identification of a total stranger.

The witness himself did not deny expressing doubt concerning his ability to identify the man he had seen (A. 25-26).

After the crime, the witness furnished the detectives a description of the men he had seen. The description was written down by the police (A. 10, Tr. 42). However, a defense demand for the production of this memorandum was unavailing, because the State was unable to find it (A. 10, 11); nor was there any secondary evidence concerning the description thus given.

Thus, we are left with a conviction produced by a single confrontation between a suspect and the witness who had seen an offender crouched, running, turning and wearing a raincoat and hat, for one or two seconds. Not surprisingly, the methods adopted resulted in an identification of the Petitioner; but we will never know whether the witness could have picked the Petitioner from a group of two people.

A lineup was indeed held. But quite incredibly, the lineup was conducted *after* the witness had identified Petitioner in a single confrontation (A. 7).

We are not, therefore, dealing with police investigators who were unfamiliar with the lineup requirement. Rather, we consider the acts of investigators determined to subvert that requirement.

The basic integrity of the fact finding process is directly involved here. We do not discuss a mere procedural safeguard whose only objective is to achieve "fairness", important as that consideration is. Instead, we deal with practices which must be prevented in order to avoid conviction of the innocent.

The Illinois Appellate Court opinion effectively concedes (Appendix A, p. 6) that the identification by Van Note, while not conclusive in itself, was essential to Petitioner's conviction.

Prior to the confrontation, witness Van Note may very well have admitted that he was not sure that he would be able to identify the man whom he had seen. The record fairly shouts that he said exactly that. Van Note professes an inability to remember whether he made that admission (A. 25-26) because "there was a lot of people

talking in the room at that time, sir" (A. 25). At best, therefore, this conviction is dependent upon the recollection of a witness who is unable to remember his own statements if somebody else is talking at the time. At worst, the uncertainty of the witness was cured by a suggestive confrontation.

The proposition cannot be overstated, and must not be understated: The suggestive tactics in this case were *not* accidental; they were deliberate and contrived.

This case does not present an instance of well meaning police investigators running afoul of an esoteric technicality. Instead, this case presents a picture of the deliberate arranging of a confrontation which was considered to be confirmatory rather than investigatory — and which was accordingly a violation of two principles of basic fairness.

Capsulated, the sequence was this: Petitioner was arrested, and a police officer stated, "That's him". He was thereupon returned, a distance of approximately four to five miles, to the LaSalle Hotel "for identification".

On the way to the LaSalle Hotel, the police literally by-passed the police headquarters building, almost directly on the way, at which a line-up was held *after* the one-to-one confrontation.

Petitioner was brought into the presence of the witness by two uniformed patrolmen, his hands cuffed behind his back. That, in the lobby of a major hotel where the appearance of policemen with a prisoner is, to say the least, a remarkable event.

Meanwhile, the witness had furnished a description of the wanted suspect. The description had been written down. The writing vanished; only the identification re-

mains. The inference here generated, has always been one of the most serious known to the law: *Omnia contra spoliatorem praesumuntur.*

At the hotel, Petitioner was confronted with two witnesses.

Of the two witnesses, one (Van Note) identified petitioner as the offender.

The other (Gnutek), repeated his prior statement that he had not actually seen the faces of the offenders, and could not identify anyone.

Then, with that accomplished, the police immediately staged a line-up wherein Petitioner was viewed by:

(a) The policemen who had arrested him;

(b) Van Note, who had just finished identifying him on the single confrontation; and

(c) Gnutek, who had already looked at the Petitioner and stated that he could not identify him or anyone else.

Gnutek was driven to the line-up by the policemen, who flatly told him, as he subsequently testified, *"that they have the fellows there if I could identify them"* (A. 5). Gnutek made no identification; but the suggestive statement thus made to him, after he had twice stated that he could not identify anyone and particularly the Petitioner, speaks volumes concerning the deliberately suggestive nature of the police practices in this case.

And even with their rigged and tainted line-up, the police were taking no chances. The Petitioner, variously identified in the record as 5′ 2″ (A. 15, 17) to 5′ 6″ (A. 13) tall, was placed in a line-up with four other men, one of whom was 6′ tall and the other three of whom were 5′ 10″

tall (A. 12). Thus, the witnesses who had previously described the offender as a short man were confronted with a line-up wherein the petitioner was, by four to eight inches, the shortest man on view. This was an aggravated recurrence of one of the "striking examples" cited in *United States* v. *Wade,* 388 U.S. 218, 232 as calling into question the basic fairness of police line-up procedures. And even among the bizarre examples cited in *Wade,* there is nothing so wildly grotesque as the imaginative procedure employed in this case: Exhibiting the suspect singly to the witness in preparation for the subsequent line-up.

In that context, the line-up identification of co-defendant Sipich is worthy of note.

The trial court suppressed the identification of Sipich, and accordingly the Sipich line-up is not directly presented for review. Yet, the circumstances of that line-up merit attention because they parallel so closely the identification techniques employed with respect to petitioner. The witness had stated that the man he observed was over 6′ tall with graying hair. Sipich, who stands almost 6′4″ tall (Tr. 10/15/69, p. 166) was accordingly placed in a line-up in which he was the tallest man, and which contained only one other man 6′ in height. That other man, was bald (A. 18). Thus, Sipich was the only person in the line-up who remotely matched the description given by the witness: the tallest man, and the only man over 6′ tall with hair. As previously noted, the resulting identification was suppressed; but it tells a great deal concerning the identification methods employed in this investigation. We repeat, because it merits repetition: This was not an instance of policemen trapped in a legal web beyond normal lay com-

prehension. The police in this case were not "investigating" in any true sense; instead, they systematically pursued a course of conduct designed to elicit proof of petitioner's guilt and to minimize the possibility that nothing would occur that might cast doubt on that guilt.

* * *

The basic commitment of the policeman, is to conduct his street investigations as "a man of reasonable caution" (*People* v. *Peak*, 29 Ill. 2d 343) and not as a headlong advocate. So long as we tolerate any other standard, the State of Illinois stands in proximate peril of convicting innocent men. The proper function of the policeman is to present, through the prosecutor, dispassionate facts to the court, and to permit the conclusions to be drawn there. Tolerance of any other standard, imperils the basic integrity of the fact finding process.

The question which we present on this petition is *not* whether the police violated a rule of law. In stark simplicity, the question is this: Must a policeman, in a non-emergent situation, behave as a "man of reasonable caution"?

The police arrested the Petitioner because:

1. They *believed,* strongly, that he was the same man who had been seen running in the vicinity of the LaSalle Hotel;

2. They *suspected,* strongly, that the running man had just committed a burglary in the hotel; and

3. They *knew* that there was a man at the hotel who *might* be able to tell them whether Petitioner was the offender, but whose observational opportunity had been extremely limited.

What would a "man of reasonable caution" have done?

What would have been the action of any reasonable person interested in *learning* whether the defendant was guilty, rather than merely dedicated to *proving* him guilty?

Obviously, any such person would have arranged a fair line-up, to see whether the witness could pick the petitioner from a small group.

With great confidence, we suggest that no lesser safeguard than that would have been employed if Petitioner had been a policeman, or a public figure of even the most minor order, or anyone else whom the investigators felt obligated to protect against a false accusation.

But the police have an obligation to protect *everyone*, including Petitioner, against a false accusation.

And it is in that very basic duty that the police failed.

The opinion below denigrates that duty, and states that in the circumstances of this case the duty did not exist. That opinion is therefore authority for all future recurrence of the absurd and dangerous procedures here adopted.

Thus, the opinion below is even more than a defiance of the *Stovall* doctrine: It imperils all of us, raises the haunting spectre of the unjust conviction, and shakes the foundations of the fact-finding process.

* * *

The Absence of Counsel

Kirby v. *Illinois* makes clear, that absence of counsel at confrontation does not *per se* warrant exclusion of the resulting identification.

But surely, the *presence* of counsel would be a circumstance tending to demonstrate the fairness of the confrontation. With equal force, *denial* of counsel is also a circumstance bearing in some degree on the Due Process question.

With respect both to the LaSalle Hotel confrontation and the subsequent line-up, defendant was never advised that he had a right to counsel, nor was counsel present (A. 20).

And the presence of counsel could have made so very much difference: A preservation of the circumstances of the LaSalle Hotel confrontation; a preservation of the preconfrontation description which Van Note had given to the detectives; perhaps, and hopefully, a forestalling of the single confrontation technique adopted here, and the holding of a legitimate line-up.

The reasonable construction of the Illinois opinion, here appended, is that absence of counsel is not even a factor in cases challenging the propriety of a pre-indictment confrontation. By that construction, your Honors' decision in *Kirby* will be taken as an invitation to law enforcement authorities to delay the preferment of formal charges as long as possible. The obvious rationale will be that the right to counsel outside a courtroom is a mere technicality rather than a matter of substance. However improbable it may seem that such was the intent of the *Kirby* decision, that construction is inevitable in Illinois, taking *Kirby* in tandem with the doctrine expressed in the appended Illinois opinion. We pray that the pre-indictment status of the right to counsel will be clarified to the extent necessary to avoid the result adumbrated here. *Kirby* holds that denial of counsel is not determinative; but surely, it must be held to be a factor in some degree.

The Justification for Suggestiveness

The opinion below is nothing less than a signal to law officers that they need not be concerned by the necessity of fairness in confrontations. Suggestive confrontations, they are told, will be excused—if not by circumstance, then by slogan.

The Illinois Appellate Court excuses the suggestive confrontation here because it "enabled the police to determine whether (petitioner) was one of the men who burglarized the hotel and it afforded the petitioner the opportunity to be freed if he were not. If Van Note had indicated that the suspect was not one of the men who fled from the hotel, the police could have resumed their search for two rather than one man" (App. A, *infra* p. 4).

That statement is only a cruel slogan, and a signal that the doctrine of *Wade-Gilbert-Stovall* is unpopular. The assertions are totally unjustified. For the confrontation did not "enable the police to determine whether" petitioner was guilty; that is the function of a line-up, which would have yielded much more reliable evidence. The notion that a prisoner is better off with a suggestive confrontation than with a line-up because the former takes less time, would be laughable if it were not so serious. The time difference is either 20 minutes or one-to-five years, depending on one's viewpoint. The police may now violate a prisoner's rights, pointing to the opinion hereto appended as the authority for the proposition that they are doing it for his own good, in order to avoid holding him for the few extra minutes that would be necessary in order to give full protection to his rights.

Surely, no one can believe that in all the circumstances, petitioner would have been turned free *after* a policeman had said "That's him" (A. 28), merely because Van Note might have been unable to identify him.

Nor can the Appellate Court properly justify the confrontation on the theory that it was necessary in order that they might know whether to continue searching for one man or for two. The police claimed certainty, from their own observations, that petitioner was one of the two men they were chasing. They had no description of the other man, except that he was "tall". They did not continue their "search", and they were concentrating all of their efforts toward incriminating the Petitioner. The search had ended; the police had arrested Petitioner, described as "the man we are looking for" (A. 16), miles from the scene. They were exploring no alternatives. They "knew" the other was hidden miles away. They were no longer "searching" in any meaningful sense.

If the supposed police uncertainty were a fact rather than an excuse — if the police really wanted to know whether Petitioner was the offender—the obvious solution was to test the witness through the use of a line-up. In fact, later, after first assuring the outcome of the line-up, they did exactly **that.**

The last thing in the officers' minds, was the contingent protection of the defendant against further detention. He would have been held, no matter what Van Note may have said; if nothing else, the traffic offenses would have justified his detention long enough for a line-up.

And it is the absurd but obvious fact, that a line-up would probably have taken *less* time than the LaSalle Hotel confrontation. The arresting party could have met Van Note and his police questioners at the line-up facility at 11th and State Streets, earlier than they could have met them at the LaSalle Hotel.

The only function served by the single confrontation in this case, was the enhancement of the probability of an identification by Van Note. And that is precisely the purpose for which a single confrontation may *not* be used.

• • •

The "Continuity of the Chase" and the Possibility of Wrongful Conviction

The appellate opinion does not suggest that a conviction would have been possible here without the Van Note testimony. In fact, the Appellate Court holds, in its concluding paragraph, that the other circumstances of the case were, in essence, only corroborative of Van Note. But these other circumstances — the "continuity of the chase" — merit analysis as demonstrative of the proposition that police practices of the type endorsed by the Appellate opinion are likely to lend to the conviction of the innocent.

Van Note saw two men. Both were wearing snap brim hats and raincoats (A. 6). Although they were out of his sight briefly, he claims that he saw them enter a car south of the LaSalle Hotel.

The police, for their part, commenced a chase of some men who they saw angling from the west part of Madison from the drug store toward the east (A. 26). That would be a completely inexplicable course for men who had just exited the LaSalle Hotel, especially assuming that their objective was an automobile parked immediately south of them on the west side of LaSalle Street. The tall man who the police observed, was not wearing a raincoat; he was wearing a grey three-quarter length car coat, black sweater and white shirt (A. 15).

He wore no hat (A. 26-27).

Granted, Van Note might have confused a three-quarter length car coat with a raincoat; but if so, that is hardly an endorsement of the notion of sending petitioner to the penitentiary because Van Note identified him on a suggestive confrontation after having seen him "for one to two seconds".

The tall man could conceivably have lost his hat while fleeing from Van Note; but according to Van Note's testimony, the distance involved was very short and he was only 30 feet behind them (A. 24). The hat would have to be lost *before* the tall man reached Madison Street; for at that point, the police saw a hatless man. There was no theoretical obstruction to Van Note's view of the tall man; and if he did not see the tall man's hat blow away, substantial doubt is cast on his claim that he had the men in sight until they entered the car, so that he could not know that they are the same men whom the police chased.

On the other hand, if the tall man did not lose his hat while running from Van Note, it is certain—mathematically certain—that the wrong men were chased, and that the wrong man was arrested.

The burglary took place in a room directly accessible from the guest area of the hotel. It is most unlikely that two men could have walked unobserved, into that room from outside and through the lobby, carrying a large quantity of burglary tools (A. 21). The burglars fled into a hallway which led both to the lobby and the upstairs guest room area (A. 21).

At about that time, Van Note heard some footsteps. He saw a hat—again, the hat—going by a partition which blocked his view. He stood on a stool, leaned out facing

east, and saw the hat heading east, so that he was never able to see the face of the wearer of the hat (A. 23). Another man standing beside him, but lacking a stool, saw nothing (A. 12). Van Note claims that the second man was behind the first so that he was able to see his face for one or two seconds (A. 6). His claim that the smaller man was the defendant, has been adjudged proper cause for sending the defendant to the penitentiary.

But the two men were so close together, that they actually entered the same louver of the revolving door (A. 24). It is most unlikely to say the least, and well nigh physically impossible for Van Note to have had more than the most fleeting of glances at the small man, who was then so very close behind the large man who had already turned his back to Van Note. For the small man was not gaining ground on the larger man; it was actually the other way around (A. 24). Thus, it is certain that the small man whose face Van Note claims to have seen would not have been more than inches behind the large man whom he admits he could not see because the large man was already facing away from him when first in his view.

And Van Note's testimony bears this out all too well. The large man, when first seen, was "just turning the settee of furniture" (A. 8). The small man "was turning the corner when I saw him". Van Note also admitted that he first saw the small man running "in the same direction of (sic) the smaller gentlemen" whom he could no longer see. He explained that he was saying he (the small man) *had turned the corner* and the time lapse (sic) because he moved pretty fast" (A. 23). That is the observation on which Van Note's identification of petitioner was predicated. Van Note saw a man crouched, running, moving "pretty fast". Inches behind, and gaining ground and

moving in the same direction was another man whom he could not see because he was headed in the wrong direction.

Van Note then gave the investigators, and the investigators wrote down the best description he could furnish of the small man whom he had seen (A. 10, Tr. 42). As previously observed, that description vanished.

In furnishing that description, Van Note almost certainly told the detectives that he was not sure whether he would be able to make an identification of the person whom they had arrested (A. 25). The record fairly shouts that he said exactly that, speaking of someone whom he knew had been arrested (A. 25-26).

And this was the man to whom uniformed police brought petitioner, handcuffed, for confrontation.

Security officer Gnutek, the only person to actually see the crime being committed, was able to say only that he had encountered a tall man and a short man "a little shorter than me". Gnutek is 5'11" tall. Petition is variously described as 5'2" (A. 15, 17) to 5'6" (A. 13), which is much more than "a little shorter" than Gnutek.

No future case could possibly present a more compelling need for a line-up as opposed to a confrontation. In no future case, could there be less of an emergency, less need to shortcut procedures. In no future case, could it possibly be more convenient to hold a line-up than in the case at bar—in fact, the police went out of their way, by-passing their headquarters station, in order to return petitioner to the hotel.

Whatever protection the *Wade-Gilbert-Stovall* doctrine provides against the conviction of the innocent, cannot possibly survive the approval by this Court of the opinion below.

CONCLUSION

Whatever is meant by the words "Due Process", no meaningful definition of the phrase could encompass the circumstances presented by this case:

1. A witness gets a one-to-two second view of a running stranger in a contorted and turning position under frenetic circumstances, and concurrently with his view of another stranger.

2. The witness is interviewed by the police. He furnishes a description, which vanishes. He does not deny telling the police that he is not sure he could identify the man again, if he saw him.

3. Defendant is arrested miles away by a group of police, one of whom says, "That's him".

4. Defendant is returned, handcuffed, into the presence of that witness "for identification". In taking the defendant to the witness, the police drive past their line-up facility.

5. The witness, seeing the defendant brought before him handcuffed, identifies him as the offender.

6. The police *then* hold a line-up for the witness.

We urge that the application of minimum standards of due process compel the exclusion of this identification. The cautionary language of *Kirby* v. *Illinois* will be meaningless if not applied here.

Respectfully submitted,

MELVIN B. LEWIS
Attorney for Petitioner

APPENDIX A

Opinion of the Appellate Court of Illinois, First District

Mr. Justice Dempsey Delivered The Opinion of The Court:

Following a jury trial the defendant, Nick Prignano, was convicted of burglary and possession of burglary tools; he was sentenced to one to five years in the penitentiary. He contends that the trial court erred in failing to suppress tainted identification testimony which connected him with the crimes.

Shortly after 2:00 A.M. on January 20, 1969, a security guard of the LaSalle Hotel, 10 North LaSalle Street, Chicago, came upon two burglars in the vault room of the hotel. He noticed tools laid out on a table and on the floor but before he had an opportunity to look closely at the men, one attacked him and the other sprayed a chemical into his face which blinded him. It was impossible for him to give an accurate description of his attackers. After a struggle the intruders fled. They ran down a corridor and into the lobby.

The night manager of the hotel, Jon Van Note, was behind the desk at the west end of the well-illuminated lobby and was facing east. He heard the shouts of the security officer and the footsteps of the fleeing men. He looked to his left and saw the men as they came out of the corridor into the lobby. The taller man ran east through the lobby to the LaSalle Street exit. Although unable to view his face, Van Note noticed that he was over six feet tall, and was wearing a hat, grey raincoat and dark trousers. The shorter man turned toward the south before

curving back east and following his accomplice out the LaSalle Street door. As he was making the turn, Van Note viewed his full face. He was about five feet, six inches tall and was wearing a blue raincoat, hornrimmed glasses, a hat and rubbers. As the men pushed through the revolving door, Van Note leaped over the desk and pursued them.

They ran south on LaSalle, crossed Madison Street and entered an automobile parked on LaSalle between Madison and Monroe. The manager, fearful that they might be armed, lagged behind, but two police officers, Daniel Jacobs and Levonn McCurry, saw the men running, sped to the scene in their squad car, pulled abreast of the parked car and asked the men why they were running. The taller man got in the passenger side and said nothing. The shorter man at the driver's side, smiled, waved and replied that everything was all right. He jumped into the auto and sped away. The squad car followed them. The officers noted the license number of the auto and reported the pursuit to police headquarters. A radio message alerted other cars in the area.

The chase went through the streets and expressways of Chicago's near south side and reached speeds up to 80 miles an hour. The policemen briefly lost sight of the pursued vehicle (during which time the taller man apparently escaped) but another squad car saw the auto as it went through a stop sign on 31st Street and curbed it at 31st and Parnell. Eight or nine police cars converged on the scene and Jacobs and McCurry immediately recognized the driver (Prignano) as the smaller man they had seen and talked to. McCurry jumped out of his car, pointed at Prignano and said, "That's him." He put handcuffs on Prignano and a wagon crew returned him to the LaSalle

Hotel. As Prignano entered the lobby, Van Note, who had not been told that anyone had been apprehended, recognized him at once. Several hours later, Van Note was requested to come to the police station, where he and the officers viewed a lineup at which they again identified Prignano.

Prignano and another man were indicted for the crimes of burglary and possession of burglary tools. Prior to the trial a hearing was held to consider the defendants' motion to suppress the identification testimony. The motion was allowed as to the co-defendant and the case against him was stricken. The motion was denied as to Prignano both at the hearing and when it was renewed at the trial. Prignano asserts that this was error because his identification by Van Note at the LaSalle Hotel occurred under such suggestive circumstances, and the lineup procedure at the police station was so prejudicial, that testimony as to both should have been excluded. He further asserts that these improper confrontations led to his identification at the trial and the in-court identification likewise should have been excluded.

A confrontation for the purpose of identification may be so suggestive as to violate due process of law; whether or not a due process violation occurs depends upon the totality of the circumstances surrounding the confrontation. *Stovall* v. *Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). *Cf. People* v. *Nelson,* 40 Ill.2d 146, 238 N.E.2d 378 (1968); *People* v. *White and Smith,* 116 Ill.App.2d 180, 253 N.E.2d 654 (1969). One of the factors to be considered in determining whether a defendant was prejudiced is the lapse of time between the criminal act and the contested identification. *People* v. *Knowles,* ..... Ill.App.2d ....., 264 N.E.2d 716 (1970).

Van Note identified Prignano less than 45 minutes after he ran from the hotel. This prompt, on-the-spot confrontation enabled the police to determine whether Prignano was one of the men who burglarized the hotel and it afforded Prignano the opportunity of being freed if he were not. If Van Note had indicated that the suspect was not one of the men who fled from the hotel, the police could have resumed their search for two rather than one man. The immediate confrontation was proper investigative conduct while Van Note's memory of the appearance of the men was at its best. *People* v. *Johnson and Steward*, ____ Ill.App.2d ....., 273 N.E.2d 503 (1971); *People* v. *Lynch*, 111 Ill.App.2d 52, 249 N.E.2d 649 (1969); *People* v. *Moore*, 104 Ill.App.2d 343, 244 N.E.2d 337 (1968). Police officers had a duty to determine as quickly as possible whether a victim of a crime can identify a person taken into custody. *People* v. *Newell*, 48 Ill.2d 382, 268 N.E.2d 17 (1971); *People* v. *Young*, 46 Ill.2d 82, 263 N.E.2d 72 (1970).

Van Note's opportunity to observe the smaller man as he fled from the hotel was a matter of seconds. However, he was alerted by the outcry of the security guard and he saw the profile and then the full face of the man who ran towards him before turning in another direction. After he returned to the hotel, following his pursuit of the men, he was questioned by the police and he described the clothing of the larger man and gave a detailed description of the smaller man. He had no knowledge that the police had caught the vehicle which was being pursued, or that a suspect had been captured and was being brought back to the hotel. When Prignano appeared in the lobby of the hotel accompanied by two policemen Van Note, who did not notice that he was handcuffed, spontaneously exclaimed that he was one of the men who had fled from the hotel.

The trial court properly denied the defendant's motion to suppress the evidence of the hotel identification.

Prignano protests his lack of counsel both at the hotel and lineup, and the manner in which the lineup was conducted. The lineup was held a few hours after Prignano's arrest. Van Note and Officers Jacobs and McCurry were there. Inasmuch as these witnesses already had identified him the lineup was superfluous. Routine police procedure was adhered to, however, and a five-man lineup was held. Van Note was asked if he recognized anyone and, if so, to place his hand on that person. Without police suggestion or intimation, Van Note singled out Prignano as the culprit. The officers also re-identified him. Prignano was the shortest man in the lineup but, since he neither testified at the trial nor presented a defense, the record is void as to his exact height—although it was variously estimated to be from 4'2" to 5'7". There is no requirement that all men placed in a lineup must be physically identical and differences in size among them, if not too great, are of little consequence.

The United States Supreme Court declared in *United States* v. *Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and in *Gilbert* v. *California,* 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed. 2d 1178 (1967), that a confrontation for identification purposes is a critical stage of a prosecution, at which time the accused is entitled to the presence of counsel. However, the Illinois Supreme Court has held that these decisions apply only to confrontations which take place after indictment. *People* v. *Palmer,* 41 Ill.2d 571, 244 N.E.2d 173 (1969). The defendant insists that the Illinois Supreme Court is in serious error and urges

this court not to adhere to its interpretation of *Wade* and *Gilbert*. At times we disagree with our Supreme Court but we have never attempted to overrule it.

Finally, we must observe that Van Note's identification testimony was only one factor leading to Prignano's conviction which, together with the continuity of the chase, established his guilt beyond all doubt.

Judgment affirmed.

McNAMARA, P.J., and McGLOON, J., concur.

APPENDIX B

Order of the Illinois Appellate Court Denying Rehearing

IN THE APPELLATE COURT OF ILLINOIS

First District

No. 55048

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

NICK PRIGNANO,

Defendant-Appellant.

It is ordered that Appellant's Petition for Rehearing be and same is hereby denied.

Dated December 30, 1971.

APPENDIX C

Leave to Appeal from Appellate Court, First District

IN THE SUPREME COURT OF ILLINOIS

No. 44965

PEOPLE OF THE STATE OF ILLINOIS,

Respondent,

vs.

NICK PRIGNANO,

Petitioner.

It is ordered that the Petition for Leave to Appeal be and same is hereby denied.

Dated March 30, 1972.